U.S. Department of Justice

Environment and Natural Resources Division

DJ#90-11-2-1109

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June 16, 1998

VIA TELEFACSIMILE ONLY

TO: Counsel of Record

Re: United States v. City of Albion, Michigan, et al., Civil No. 1:97CV1037 (W.D. Mich.) — Draft Joint Status Report.

Dear Counsel:

Attached is the revised draft Joint Status Report incorporating comments, amendments and additions I received yesterday and today. I've incorporated all comments essentially verbatim, taking only minor editorial liberties in the interest of document consistency. Please note that some parties' positions have changed since our conference call on June 9, 1998. In light of this, I am prepared to convene another conference call among the parties tomorrow if deemed appropriate by anyone.

Otherwise, please review for accuracy of incorporation of your material and document coherence. I will contact each of you tomorrow, Wednesday, June 17, 1998, to obtain your additional comments and seek your permission to sign the document on your behalf. Again, it is my understanding that the Joint Status Report must be filed by Friday, June 19, 1998 to meet the Court's deadline.

Again, thank you for your cooperation and assistance. If there are any questions, please do not hesitate to call.

Sincerely,

Francis J. Biros
Trial Attorney
Environment and Natural Resources Division

DRAFT 6/16/98

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
v.	Case No. 1:97-CV-1037
CITY OF ALBION, MICHIGAN, Defendant/Third-Party Plaintiff, Counter-Defendant, Counter-Claimant,	Hon. David W. McKeague Mag. J. Joseph G. Scoville
v.	
COOPER INDUSTRIES, INC. and CORNING, INCORPORATED, Third-Party Defendants, Counter-Claimants and Third-Party Plaintiffs,	
v.	
DECKER MANUFACTURING CORPORATION, Third-Party Defendant, Counter-Claimant and Cross-Claimant.	

JOINT STATUS REPORT

A Rule 16 Scheduling Conference is scheduled for Wednesday, June 24, 1998 - 11:00 a.m. Appearing for the Parties as counsel will be:

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Counsel for the Parties conferred by telephone on June 9, 1998, pursuant to the Court's Order and Fed. R. Civ. P. 26(f), to discuss the nature and basis of the Parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, the formulation of a discovery plan, and the additional topics discussed herein.

Plaintiff United States and Defendant City of Albion ("Albion") propose that the litigation be conducted in phases in the interests of facilitating the Court's management of the case

and conserving the Court's and the Parties' time and resources. Third-Party Defendants Cooper Industries, Inc. ("Cooper") and Corning, Inc. ("Corning") do not believe that two phases of litigation are warranted and propose that all issues relating to liability, response costs, damages, penalties and allocation of contribution should all be addressed in one phase of litigation. Third-Party Defendant Decker Manufacturing Corp. ("Decker") objects to the proposed phasing because discovery regarding liability is intertwined with the damage and allocation issues to be addressed in Phase II (see below). Decker also believes that a phased approach will prolong the litigation and delay resolution of critical allocation issues.

As proposed by the United States and Albion, "Phase I" of the litigation would encompass liability issues relating to Albion, Cooper, Corning and Decker. "Phase II" would encompass issues relating to response costs, damages, penalties and allocation of contribution among Defendant and Third-Party Defendants. The proposed scheduling in this Joint Status Report is based on this phased litigation approach. The Parties further request that the Court convene a second Rule 16 Scheduling Conference upon adjudication of the liability issues in Phase I

to address amendments to the Case Management Order necessary to address Phase II.

1. Jurisdiction:

The United States alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1311, 1345 and 1355 and Sections 107(a), 106(a) and 113(b) of the Comprehensive Environmental response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9607(a), 9606(a) and 9613(b). Defendant Albion, in its Answer, has neither admitted nor denied that the Court has jurisdiction under these statutes, and further, reserves its objections to the Court's jurisdiction based upon the doctrine of sovereign immunity under the Eleventh Amendment of the Constitution of the United States.

Albion, in its Third-Party Complaint against Cooper and Corning, alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1331, 1337 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction. Cooper and Corning do not object to Albion's jurisdictional assertions. Moreover, in their Counterclaim against Albion, as well as their Third-Party Complaint against Decker, Cooper and Corning also allege that the basis for the

Court's jurisdiction over their Counterclaim is 28 U.S.C. §§ 1331 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction. In its Counterclaim against Cooper and Corning, and in its Cross-claim against Albion, Decker also alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1331 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction.

2. Jury or Non-Jury:

Albion has filed a Jury Demand pursuant to Fed. R. Civ. P. 38 on all causes of action so triable as of right. As to any causes not so triable as of right, Albion requests that an advisory jury be impaneled by the Court pursuant to Fed. R. Civ. P. 38(c). The United States opposes Albion's Jury Demand and advisory jury request, and requests trial by the Court on all issues of law and fact affecting the United States' claims. Decker also has demanded a trial by jury in connection with claims asserted against Decker by Cooper and Corning in their Third-Party Complaint.

3. Judicial Availability:

The Parties do not agree to have their case tried by a

Magistrate Judge if the case proceeds to trial.

4. Geographic Transfer:

The Parties agree that a transfer for geographic convenience is not warranted in this case.

5. Statement of the Case:

Plaintiff United States

The United States filed this action against Albion pursuant to Sections 106(b), 107(a), and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9606(b), 9607(a), and 9613(g)(2). In its first claim for relief, the United States seeks, under Section 107(a) of CERCLA, recovery of unreimbursed past costs incurred in connection with response actions by the U.S. Environmental Protection Agency ("U.S. EPA") at the Albion-Sheridan Township Landfill Superfund Site located at 29975 East Erie Road in Sheridan Township, Calhoun County, Michigan (the "Site") and other response costs at the Site. The United States alleges that Albion is liable under Section 107(a)(2) as the operator of the Site at the time of disposal of the hazardous substances. The United States also seeks a declaratory judgment under 42 U.S.C. § 9613(g)(2), against Albion for future response costs to be incurred by U.S. EPA in connection with the Site.

DRAFT 6/16/98

In its second claim for relief, the United States seeks civil penalties under Section 106(b) for violation of a Unilateral Administrative Order ("UAO"), Docket No. V-W-96-C-316, issued on October 11, 1995 by U.S. EPA under Section 106(a) to four potentially responsible parties ("PRPs") to conduct response actions at the Site. This claim is asserted against Albion for its alleged refusal to comply with the Unilateral Administrative Order.

The United States has agreed to the phasing of litigation proposed in this Joint Status Report because of the unique facts of this case. However, Congress, in its CERCLA legislative history, CERCLA and case law make clear that private party apportionment issues and related issues are to be determined after all questions of liability and remedy at a site have been resolved in actions for cost recovery and contribution involving the government and private parties. Accordingly, the United States' contends that Phase I of this litigation should proceed expeditiously and that apportionment issues and other related issues among the private parties during the Phase I liability phase not interfere with U.S. EPA's ability to achieve rapid recovery of Superfund costs in its main enforcement case for

reinvestment at other sites.

Defendant/Third-Party Plaintiff/Counter-Defendant/ Counterclaimant City of Albion

The City of Albion has denied liability on the United States' Complaint, including the claim that it was an "operator" of the Landfill based, in part, on the fact that the City never exercised direct, day-to-day direction or control over the Landfill activities. Albion never managed, directed, or conducted operations at the Landfill relating to the disposal of hazardous waste. At all pertinent times the Landfill real estate was owned by Mr. Gordon D. Stevick, and Albion had no real estate interest in the Landfill. The Landfill is located outside the jurisdiction of the City of Albion in Sheridan Township and, therefore, Albion had no regulatory authority over the Landfill. In addition, at all relevant times, the licensed Landfill operator was Mr. Gordon D. Stevick, not the City of Albion, and no City employees ever worked at the Landfill. Additionally, numerous other municipalities, industries, businesses, and independent haulers used the Landfill. Albion has also denied the United States' claim for civil penalties based, in part, on the fact that the City has a "sufficient cause" defense to

liability on the U.S. EPA Unilateral Administrative Order.

On February 5, 1998, the City of Albion filed a Third-Party Complaint against Cooper and Corning, other PRPs identified by the United States EPA, but not named in the United States' principal Complaint. Additionally, in response to a Counterclaim filed against the City of Albion by Third-Party Defendant Decker Manufacturing, Albion filed a Counterclaim against Decker on May 20, 1998. Albion filed its Third-Party Complaint against Cooper and Corning and Counterclaim against Decker pursuant to CERCLA, 42 U.S.C. §§ 9607(a) and 9613(f), Part 201 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), as amended, M.C.L. § 324.20126a, Section 20129(3) of NREPA, M.C.L. § 324.20129(3), common law and statutory contribution, and other applicable Federal and State law. Among other relief, Albion seeks cost recovery and contribution from the Third-Party Defendants for any damages or costs of response incurred by Albion in conjunction with the Site or as a result of the principal Complaint.

Third-Party Defendants/Counterclaimants and Third-Party Plaintiffs Cooper Industries, Inc and Corning, Inc.

Cooper and Corning filed Counterclaims against Albion

alleging that Albion is liable pursuant to CERCLA Section 107, 42 U.S.C. § 9607, and NREPA Section 20126, M.C.L. § 324.20126, for past and future response costs incurred and to be incurred by Cooper and Corning at the Site. See Counts I and III, respectively. Additionally, Cooper and Corning seek contribution from Albion pursuant to CERCLA Section 113, 42 U.S.C. § 9613, NREPA Section 20129(3), M.C.L. § 324.20129(3), and common law contribution. See Counts II, IV and VI, respectively. Cooper and Corning also seek a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., finding Albion liable to Cooper and Corning for damages and response costs that have been or will be incurred at the Site. See Count V.

Cooper and Corning also filed a Third-Party Complaint against Decker alleging that Decker is liable pursuant to CERCLA Section 107, 42 U.S.C. § 9607, and NREPA Section 20126, M.C.L. § 324.20126, for past and future response costs incurred and to be incurred by Cooper and Corning at the Site. See Counts I and III, respectively. Additionally, Cooper and Corning seek contribution from Decker pursuant to CERCLA Section 113, 42 U.S.C. § 9613, NREPA Section 20129(3), M.C.L. § 324.20129(3), and

common law contribution. See Counts II, IV and VI, respectively. Cooper and Corning also seek a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., finding Decker liable to Cooper and Corning for damages and response costs that have been or will be incurred at the Site. See Count V.

Cooper and Corning deny that they are liable parties and that they are liable to Albion or Decker for contribution as alleged in Albion's Third-Party Complaint against Cooper and Corning and as alleged in Decker's Counterclaim against Cooper and Corning. Cooper and Corning also reserve the right to contest the validity and lawfulness of the Unilateral Administrative Order issued by U.S. EPA for the Site.

Third-Party Defendant/Counterclaimant and Cross-Claimant Decker Manufacturing Corp.

Decker has filed a Counterclaim and Cross-claim against Cooper/Corning and Albion, respectively, seeking contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), Section 29(3) of NREPA, M.C.L. 324.20129(3), as well as common law, toward the response costs Decker has incurred in connection with the Site. By way of example and not limitation, Decker

purchased the properties adjacent to the Site at a cost of over $100,000, at the request of the U.S. EPA and pursuant to the UAO, in order to provide the access required to implement the required work. Decker has also agreed to a Consent Decree with the United States which was lodged with the Court on May 14, 1998. Under the Consent Decree, if entered by the Court, Decker will pay $250,000 toward the United States' past response costs.

Decker denies liability to Cooper/Corning or Albion under their Third-Party Complaint and Counterclaim. To the extent Decker is a liable party, Decker has already incurred more than its fair share of the total Site costs, based on its limited contribution to the Site conditions, if any, when compared to other parties in this lawsuit. Moreover, to the extent these claims arise from the Claimants' liability for the United States past response costs, Decker is, upon entry of the Consent Decree, entitled to contribution protection. Finally, contrary to their Third-Party Complaint and Counterclaim, Cooper/Corning and Albion do not have standing to assert claims for cost recovery (as opposed to contribution) pursuant to Section 107 of CERCLA or Section 26 of NREPA. Rather, as PRPs, their claims are limited to contribution.

6. Pendent State Claims:

The Third-Party actions in this case include claims for recovery of past and future response costs and contribution, raised under the Michigan Natural Resources and Environmental Protection Act ("NREPA"), M.C.L. §§ 324.20101 et seq., Michigan Contribution Between Joint Tortfeasors Act, M.C.L. §§ 600.2925(a) et seq., and common law principles of contribution.

7. Joinder of Parties and Amendment of Pleadings:

The Parties shall join any additional parties to this action and amend their pleadings by August 24, 1998, sixty (60) days following the June 24, 1998, Rule 16 Scheduling Conference. Any further joinder or amendment shall be by motion for good cause shown.

8. Disclosures and Exchanges:

(i) The Parties have initiated discovery in this case and have advanced beyond the desirability for the initial disclosures delineated in Fed. R. Civ. P. 26(a)(1). Thus, the Parties believe that disclosures pursuant to Rule 26(a)(1), and associated schedules for such disclosures, are unnecessary.

(ii) The United States expects to exchange the names of known fact witnesses by October 24, 1998, and expert witnesses by

November 24, 1998, 120 days and 150 days respectively, after the Court's Scheduling Conference of June 24, 1998. Albion expects to exchange the names of known fact witnesses by November 24, 1998, and December 24, 1998, 150 days and 180 days respectively, after the Court's Scheduling Conference of June 24, 1998. The Third-Party Defendants expect to exchange the names of their known fact witnesses by December 24, 1998, and expert witnesses by January 24, 1999, 180 days and 210 days respectively, after the Court's Scheduling Conference of June 24, 1998.

(iii) The Parties agree that it would be advisable to exchange expert witness reports pursuant to Fed. R. Civ. P. 26(a)(2), and propose to exchange expert witness reports thirty (30) days after the date of the disclosure of expert witnesses by each party according to the schedule in the preceding paragraph.

(iv) The Parties have initiated discovery in the case and are currently making documents available pursuant to document production requests. Therefore, a schedule for making documents available without the need for a formal request for production is unnecessary.

9. Discovery:

The Parties believe, at this time, that "Phase I" liability

discovery proceedings can be completed by March 24, 1999, 270 days following the June 24, 1998, Rule 16 Scheduling Conference. The Parties recognize that there may be some overlap of discovery in Phase I with Phase II, particularly relating to allocation issues, but agree to avoid duplication of discovery between the phases. As noted above, Cooper and Corning do not believe a two-phase approach to this litigation is warranted.

The Parties anticipate needing at least the number of depositions and interrogatories set forth in the Court's Differentiated Case Management Plan for complex litigation, but reserve the right to seek the approval of the Court to amend any discovery limitations, if determined by any one of the Parties to be necessary due to complexity of the case. The Parties do not anticipate time limits on depositions or limitations on scope of discovery pending resolution of dispositive motions at this time.

The Parties' discovery during Phase I shall be conducted to elucidate facts and information related to respective claims of liability of the Defendant and Third-Party Defendants at the Site pursuant to CERCLA, NREPA and other pendent state claims.

10. Motions:

Dispositive Motions. The Parties anticipate filing

motions for full or partial summary judgment on Phase I issues, Defendant's and Third-Party Defendants' alleged liability for response costs under CERCLA, NREPA and pendent state claims, by May 24, 1999, sixty (60) days following the Phase I discovery cut-off date.

Non-dispositive Motions. The Parties acknowledge that it is the policy of this Court to prohibit the consideration of non-dispositive motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

11. Alternative Dispute Resolution:

Some of the Parties agree that an early informal settlement conference supervised by Magistrate Judge Joseph G. Scoville and scheduled within sixty (60) days following the June 24, 1998 Scheduling Conference, may be desirable. Cooper and Corning favor early, non-binding, voluntary facilitative mediation by a mediator who concentrates in the environmental litigation practice area.

12. Length of Trial:

The Parties agree that the length of trial be determined by

the Court, with recommendations from the Parties, at the second Rule 16 Scheduling Conference following determination by the Court of summary judgment motions as to liability in Phase I of this action.

13. Prospects of Settlement:

The United States and Albion conducted pre-filing settlement negotiations during July - December 1997 without success. Pre-filing settlement negotiations between the United States and Decker resulted in a partial settlement for past response costs, and civil penalties and damages through November 12, 1997, as set forth in the Consent Decree lodged with the Court on May 14, 1998, that is currently in a public comment period pursuant to terms of the Consent Decree and Department of Justice policy at 28 U.S.C. § 50.7. [See 63 Fed. Reg. 29752 (June 1, 1998)].

14. Track Assignment:

The Parties recommend that this matter be assigned to the Complex Litigation Track, identified as Track #IV, in the Court's Differentiated Case Management Plan.

Respectfully submitted,

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